Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-745

ROBERT PETER FAVREAU, *Petitioner,*

versus

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOURTH CIRCUIT

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ROBERT PETER FAVREAU, *Petitioner,*

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOURTH CIRCUIT

Petitioner, ROBERT PETER FAVREAU, prays that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in the above-styled cause.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has not yet been officially reported. A copy of said opinion is set forth in Appendix A, infra, p. 1a.

JURISDICTION

The opinion of the U.S. Court of Appeals of the Fourth Circuit was filed, and judgment entered, on August 16, 1978. (See App. A, infra, p. 1a). A timely

petition for rehearing was denied on October 4, 1978. The order denying said petition is set forth in App. B, infra, p. 3a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). App. C, infra, p. 4a is the pre-trial Order of the District Court which was incorporated by the Fourth Circuit in its opinion.

QUESTION PRESENTED

Whether confession and admission obtained from Defendant during custodial interrogation, absent Miranda Warnings, are admissible.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time or war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF CASE

On March 15, 1977, a true bill of indictment was returned in Columbia, South Carolina, charging the Defendant, Robert Peter Favreau, et al., with three separate violations of Federal Drug Laws. Count I charged conspiracy to smuggle marijuana in violation of 21 U.S.C. 963; Count II charged the offense of smuggling of marijuana and aiding and abetting in violation of 21 U.S.C. 952(a) and 18 U.S.C. 2, respectively, and the third Count of the indictment charged possession of marijuana with intent to distribute in violation of 21 U.S.C. 841(a)(1). The Defendant filed various Motions to Suppress seeking to exclude a confession as well as the fruits of a warrantless search of an aircraft. An extensive evidentiary hearing was held on April 15, 1977, and in due course an opinion was issued by the Honorable Robert W. Hemphill, Federal District Court Judge, denying both of the Defendant's Motions to Suppress. (R Vol. I at 48).[1]

The case was scheduled for trial by jury but after approval of the Defendant's waiver of trial by jury, the matter was tried by the Court without a jury at Charleston, South Carolina. The evidentiary predicate presented to the Court in the non-jury trial was based upon stipulation and live testimony produced before the Court on April 15, 1977, and May 24, 1977, and upon this evidence the Court entered its findings of fact (R Vol I at 66) with the conclusion that the Defendant was found guilty of all three counts of the indictment on July 2, 1977.

The Petitioner instituted an appeal to the Fourth Circuit Court of Appeals by Notice of Appeal filed July 25, 1977. The Fourth Circuit summarily affirmed the District Court's pre-trial Order denying Petitioner's Motions to Suppress. After a timely Motion for Rehearing was denied, Petitioner seeks relief in this Court asking for issuance of a Writ of Certiorari.

The facts relevant to the questions presented are as follows:

On December 28, 1976, the United States Drug Enforcement Administration (hereinafter referred to as

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[1] Citations to the Record on Appeal are denoted "R Vol. —— at ——."

D.E.A.) received information that a DC-4 aircraft, registration number unknown, had arrived at Daytona Beach Regional Airport, Daytona Beach, Florida, and that the plane was going to make a trip to Colombia, South America (R Vol. II at 3) but when the plane was to return and what its cargo was to be, as well as its destination, were unknown. The D.E.A. in Miami, Florida acting in consert with the local Daytona Beach, Florida, task force agents, being members of local law enforcement agencies' narcotics squads which comprised the Volusia County Narcotics Task Force (hereinafter referred to as VCNTF), took surveillance photos of individuals working in and around the DC-4 aircraft. One of the individuals was identified as Robert Peter Favreau. Although Agent Grayson of the VCNTF testified that nothing was seen that was anything but innocuous conduct coupled with the fact that the Defendant Favreau, had no arrest record at all (R Vol III at 17); nevertheless, apparently fearing that the DC-4 aircraft was about to engage in smuggling activities, steps were initiated by the Volusia County Narcotics Task Force and agents of the D.E.A., to attempt to surveil the aircraft should it leave the Daytona Beach Regional Airport.

On December 29, 1976, the DC-4 aircraft left Daytona Beach, Florida at 7:00 P.M., in an unknown direction for an unknown destination (R Vol. II at 11, 12). When allegedly last observed somewhere in the vicinity of the Island of Andros the DC-4 aircraft was headed in a direction, which in approximately one hour would have placed the aircraft over Colombia, South America. No other surveillance of any kind was affected regarding the DC-4 aircraft until it was ultimately located approximately two and one half days later at Walterboro, South Carolina.

Therefore, before the aircraft was located at Walterboro, South Carolina, at approximately 10:00 or 11:00 A.M. on January 1, 1977, the sum total of facts that could have been relied upon for probable cause to search the DC-4 aircraft were as follows: First, some vague source unverified (R Vol II at 85) whose reliability was unknown (R Vol. II at 28) had speculated that the DC-4 plane might be going to make a *trip* to Colombia, South America, but for what purpose was unknown (R Vol. II at 3) (Emphasis added); second, visual surveillance at the Daytona Beach Regional Airport revealed that metal cargo rollers had been loaded onto the aircraft, which was designed as a cargo plane; third, due to the fact that no effort was made to conceal on ground activities and repairs to the DC-4 aircraft no information was developed to indicate anything but innocuous activity; fourth, the plane had been allegedly surveilled in some fashion to within approximately one hour of Colombia, South America. All other information that would have been possessed by law enforcement officials prior to entry of the aircraft was based upon and obtained from the Defendant as a result of a custodial interrogation by Deputy Zeek Walker of the Volusia County Sheriff's Department without the Defendant being advised of his rights against self-incrimination. (R Vol. II at 32, 62, 63).

Although there had been statewide "BOLO" for the DC-4 aircraft in the State of Florida; nevertheless, the plane could not be located. One of the law enforcement officers that participated in flying reconnaissance with an agent of the D.E.A. was Volusia County Sheriff's Deputy Zeek Walker, pilot and deputy for the Volusia County Sheriff's Department. Deputy Zeek Walker had been informed of what local and state narcotic task

force agents suspected regarding the DC-4 aircraft which allegedly contained Deputy Walker's close personal friend, the Defendant, Robert Peter Favreau. (R Vol. II at 7, 47). Deputy Walker was also told that a Mr. Wilman of TransFlorida Airlines had seen the Defendant, aboard the DC-4 as the plane left Daytona Beach, Florida, and finally, that the plane had been surveilled in some fashion to within approximately one hour of Colombia, South America. After acquiring the aforementioned facts and knowledge regarding the investigation of the Defendant, Deputy Walker was asked by Lt. Clain of the Volusia County Narcotics Task Force to try to locate the Defendant, and to inform Lt. Clain as soon as he had located the Defendant. Consequently, Deputy Walker made repeated calls to the Defendant's home on December 30th and 31st. (R Vol. II at 64) While returning home from a New Year's Eve party, Deputy Walker drove by the Defendant's residence in DeLand, Florida, at approximately 4:00 A.M., on January 1, 1977, and noticed that the Defendant's car had returned, whereupon he proceeded to a telephone booth and called the Defendant telling him that he needed to speak with him in person, immediately. (R Vol. II at 49).

Arriving at the Defendant's home at approximately 4:00 to 4:30 A.M. on January 1, 1977, Deputy Walker set about to interrogate the Defendant, in his car as to where he had been and what he had been doing. Initially the Defendant denied that he had been involved in any impropriety; whereupon Deputy Walker stated in a vituperative manner that he knew what was going on and then revealed to the Defendant the state of his knowledge and that the Defendant had better tell him the whole truth in order for him to be able to help the Defendant. (R Vol. II at 50) Whereupon the Defendant, made a complete statement of his activities and involvement to Deputy Zeek Walker.

Although Deputy Walker felt that he had probable cause to arrest the Defendant, (R Vol. II at 55), he never at any time advised the Defendant of his constitutional rights against self-incrimination. (R Vol. II at 58, 61) Deputy Walker interrogated the Defendant for approximately two hours during which time the Defendant was not free to go and was deprived of his freedom of movement in a significant manner because it was Deputy Walker's intention to take the Defendant, to the Volusia County Narcotics Task Force trailer (station house) whether the Defendant wanted to go or not. (R Vol. II at 53; R Vol. VIII at 64).

At the Narcotics Task Force trailer (station house) the scenario developed that the Defendant was taken to one end of the trailer and Deputy Walker to the opposite end. While Deputy Walker was being debriefed by local task force agents, he related almost all of the information obtained from the Defendant before any attempted interrogation of the Defendant by other task force agents (R Vol II, at 22, 63). The Defendant was advised of his rights against self-incrimination by Agent Hockenberry of the Narcotic Task Force and the Defendant made only one statement to the effect that he had been on the DC-4 aircraft when it left Daytona Beach and that the aircraft flew south to a grass strip south of Miami where it landed and he exited the aircraft and stayed there for one day before returning to Orlando and driving to his home in Deland. After making this statement to Agent Hockenberry the Defendant stopped talking. Sometime later the Defendant was advised of his rights for a *second* time by D.E.A. Agent Ernie Mertens. The Defendant gave only

his name and age and admitted that he was at the Daytona Beach Airport on the day the aircraft took off but when asked if he was aboard the aircraft the Defendant responded that he would like questioning to cease and acquire an attorney, whereupon questioning ceased. (R Vol. II at 16, 19) The Defendant was then allowed to phone an attorney and after talking over the phone privately with a local lawyer, the Defendant was allowed to consult with his lawyer whereupon he was transported back to his home in Deland, Florida, after having been deprived of his freedom of movement for approximately *twelve hours.* (Emphasis added)

Lt. Clain and Agents Hockenberry and Grayson in debriefing Deputy Zeek Walker regarding the information he had obtained from his close friend, the Defendant, ascertained the possibility that there might be an explosive device or bomb of some sort aboard the aircraft. (R Vol. II at 56, 57). Consequently, after the Defendant had indicated that he desired questioning to cease and that he desired the services of an attorney, (R Vol. II at 16, 18); nevertheless, when the Defendant returned from seeing his attorney, agent Mertens asked the Defendant "Is the bomb still on board?", whereupon the Defendant was allowed to speak with Deputy Walker for a moment. Deputy Walker told the Defendant that it would be best to tell the complete truth; therefore, the Defendant stated that there is no bomb aboard the aircraft and this information was telephoned to the D.E.A. at the Walterboro Airport. (R Vol. II at 74, 75).

Once the local narcotics task force agents in Daytona Beach had determined that the Defendant, had flown on a commercial airline from Charleston, South Carolina on the evening of December 31, 1976, the investigation was then focused in the Charleston area resulting in discovery of the aircraft parked on a tie down strip with chalks in place and the doors of the aircraft closed and secured (R Vol. II at 33, 34).

All information obtained from the Defendant, was given to D.E.A. Agent Luther Cooke, agent in charge of the Charleston office, by VCNTF Agent Hockenberry. (R Vol. II at 20, 39, 40). Agent Hockenberry made two calls to D.E.A. Agent Cooke, the first call was around 8:00 A.M. and a message was left and the second call was after 12:00 noon and it was the second call that Agent Hockenberry mentioned there might be a bomb. (R Vol. II at 12, 20, 34). However, Agent Cooke swore he learned of the plane and bomb possibility around 8:30 A.M. on January 1, 1977, before he ever talked with Hockenberry. (R Vol. II at 66). Agent Hockenberry told D.E.A. Agent Cooke that the plane was *empty.* (R Vol. II at 38).

The aircraft was apparently boarded by at least three individuals, one of whom represented himself as a Customs Agent, shortly before 11:00 A.M. (R Vol. II at 104) on January 1, 1977. The initial entry into the aircraft was accomplished by borrowing a ladder from the owner of the Walterboro Airport, Harlon A. Pontious. (R Vol. II at 103). In fact, Mr. Pontious stated that it was not until *later* in the afternoon that there was talk of a bomb scare (R Vol. II at 104, 110, 111). It should be remembered that the conversation between D.E.A. Agent Mertens and the Defendant, regarding the presence of a bomb and the Defendant's statement to the effect that there was no bomb aboard occurred at approximately 3:00 P.M. on January 1, 1977.

In any event, after the possibility of an explosive device was learned no further action at reboarding the

aircraft was taken until after 1:00 P.M. on January 1, 1977, and the plane was boarded at approximately 3:00 P.M. (R Vol. II at 86).

The aircraft was entered and searched without any attempt whatsoever at securing a search warrant (R Vol. II at 86), notwithstanding the fact that the aircraft had been on the ground for approximately two and a half days and that there existed no exigent circumstances.

Notwithstanding the testimony, the trial Court and the lower Court rejected the Defendant's contention that an objective assesment of the facts and subjective feelings of the Defendant and Deputy Walker showed that the Defendant was subject to custodial interrogation, and held that the Defendant was not in custody consequently his confession was admissible and as such formed the probable cause basis for the warrantless entry of the DC-4 aircraft at Walterboro which the Court also found to be the functional equivalent of the border. It is these findings of fact which were the predicate for Defendant's judgment and sentence that he seeks to have reviewed as well as what he feels was an erroneous application of the law to the facts.

REASON FOR GRANTING THE WRIT

I. Whether Confession and Admission Obtained From Defendant During Custodial Interrogation, Absent Miranda Warnings, Are Admissible.

In answering the question presented, the District Court correctly stated that it must determine whether or not the interrogation was custodial or non-custodial as defined in *Miranda* v. *Arizona*, 384 U.S. 436, 16 L.Ed 2d 694, 86 S.Ct. 1602 (1966), and subsequent cases. However, an examination of the record shows that the Defendant was in custody, notwithstanding the District Court's finding because an objective assessment of the facts and articulated subjective intents of the Defendant and the Deputy Sheriff belie the District Court's ruling. *United States* v. *Nash*, 568 F.2d 1166, 1168 (5th Cir. 1977). Consequently, the method by which the lower court decided this case has created a conflict with prior decisions of this Court defining the limits of custodial interrogation, as well as the methodology to be employed in determining whether or not questioning by a police officer which results in incriminating statements, in the absence of Miranda warnings, is improper.

This Court and other Federal Courts have stated that the determination between custodial and non-custodial interrogation, should be by means of an objective test wherein a Court must searchingly examine the conversation, circumstances of the conversation, and in particular whether or not the investigation has focused unerringly on the Defendant as a possible Defendant of a specific crime rendering the allegations accusatory in nature. *Oregon* v. *Mathiason*, 429 U.S. 492, 50 L.Ed. 2d 714, 97 S.Ct. 711 (1977); *Beckwith* v. *United States*, 425 U.S. 341, 48 L.Ed. 2d 1, 96 S.Ct. 1612 (1976); *United States* v. *Carollo*, 507 F.2d 50 (5th Cir. 1975); *United States* v. *Lackey*, 413 F.2d 655 (7th Cir. 1969); *Rosario* v. *Guam*, 391 F.2d 896 (9th Cir. Guam (1968).

Utilization of an objective test in the instant case reveals two critical errors committed by the District Court in its assessment of the facts and the articulated subjective feelings of both the Defendant and Deputy Walker during the interrogation. First, the District Court found that there are no objective indications that the Defendant was in custody or otherwise deprived of his freedom of movement. It is painfully obvious

that an examination of the conversation disclosed several objective indications of a custodial atmosphere with inherently coercive effects. For example the District Court failed or did not consider the following facts: 1. Deputy Walker's help was enlisted because he was a close personal friend of the Defendant; 2. Deputy Walker was totally informed of the state of the investigation and that it had focused unerringly on the Defendant as a suspect; 3. The conversation between Deputy Walker and the Defendant occurred at 4:00 A.M. on January 1, 1977, although New Year's Eve there was no social talk but an immediate accusation made against the Defendant (R Vol. II at 50); 4. Deputy Walker then rejected Defendant's denial, got mad and cussed the Defendant and then proceeded to detail his knowledge regarding the Defendant's activities; 5. Deputy Walker told the Defendant that he was taking him to the Volusia County Narcotics Task Force Trailer (as he had earlier told the Defendant's business partner, R Vol. VIII at 51) and he intended to take the Defendant there whether he liked it or not. (R Vol. II at 63; R Vol. VIII at 10); 6. Deputy Walker would not let the Defendant drive his own vehicle but told him . . . "You will have to go with me in my vehicle." (R Vol. VIII at 12); 7. Once the Defendant was advised of his constitutional rights by Task Force Agents after the interrogation by Deputy Walker that the Defendant invoked his rights and he was allowed to see a lawyer because he saw Deputy Walker as a friend and not as a police officer and it never occurred to him that he had constitutional rights of silence. (R Vol. II at 124, 125); finally the objective fact that the Defendant was in custody after he was taken from his home questioned and detained for a period of approximately twelve hours.

The second error committed by the District Court is easier to see and appreciate than the first. Having determined that there were no objective indications that the Defendant was in custody the District Court then purported to make an objective examination of the subjective feelings of both the Defendant and Deputy Walker. A fair reading of the District Court's opinion (See App. C, infra, p. 4a), shows that the Court's determination turned almost exclusively upon the subjective and hypothetically reconstructed intent of the Defendant without any consideration of the *articulated* subjective intent of Deputy Walker, who had taken the Defendant in custody and whose testimony unequivocally showed that he intended to keep the Defendant in custody. In fact, Deputy Walker testified that he would have taken the Defendant to the Task Force Trailer no matter what he told him. (R Vol. VIII at 64). The District Court's determination that the Defendant was not in custody was made almost solely upon the Defendant's statement that at the time immediately prior to his incriminating admissions to Deputy Walker that he did feel that he could have told Deputy Walker to get lost and go home, although he never tried to exit the car. The fallacy of this determination is that to reach the conclusion that the interrogation was non-custodial the District Court had to engage in conjecture regarding the subjective intentions of Deputy Walker and it is these holdings that are belied by the facts. The magnitude of the District Court's error which was amplified beyond the bounds of reason by the lower court's summary affirmance and incorporation of the District Court's Order is seen in

the following two findings by the Court attributed to Deputy Walker.

> "Deputy Walker, on the other hand, did not feel that he was obliged to or justified in taking the Defendant into custody until *after* the confession had been made. It is clear in this case that although Deputy Walker suspected the Defendant, he would not have taken the Defendant into custody absent the challenged confession." (App. C, infra, p. 10a, Order of District Court)

This finding by the District Court is at loggerheads with the *articulated* sworn testimony of intention given by Deputy Walker, and it was necessary because to reach the conclusion that it did require imputing this intent to Deputy Walker because the facts belie this determination.

The District Court's ruling was grounded upon this Court's decision of *Oregon* v. *Mathiason,* 429 U.S. 492, 50 L.Ed. 2d 714, 97 S.Ct. 711 (1977). However, the application of *Mathiason* to the facts resulted in conflict which must be cured by this Court. In addition to objective facts and articulated intent showing that the Defendant was in custody, Petitioner unlike Mathiason did not voluntarily come to the station house, nor was he told in express terms that he was not under arrest, nor was he, unlike Mathiason free to in fact leave because he was deprived of his freedom in a significant manner.

Resolution of the legal question of whether Defendant was in custody turns on whether the beliefs were reasonable. *United States* v. *Beckowles,* 432 F.2d 8, 17 (9th Cir. 1970).

This Court, as it did in *Mathiason,* should reverse and find as a matter of law that the Defendant was in

custody, notwithstanding the District Court's findings because an objective assessment of the facts and articulated subjective intents belie the lower court's ruling. The confession and admissions of the Defendant obtained during custodial interrogation absent *Miranda* warnings are inadmissible.

CONCLUSION

Therefore, due to the fact that a substantial amount if not almost all of the information obtained by the Government was tainted due to the primary illegality in the form of the failure to warn the Defendant of his constitutional right to remain silent, it is apparent that this taint renders said information and any testimonial fruits which formed a substantial portion of the predicate for any alleged probable cause the fruit of the poisonous tree and thereby inadmissible. *Harrison* v. *United States,* 392 U.S. 219, 20 L.Ed. 2d 1047, 88 S.Ct. 2008 (1968), *Wong Sun* v. *United States,* 371 U.S. 471, 9 L.Ed 2d 441, 83 S.Ct. 407 (1963).

Consequently, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals, Fourth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Unpublished

No. 77-2141

UNITED STATES OF AMERICA, *Appellee,*

v.

ROBERT PETER FAVREAU, *Appellant.*

Received August 18, 1978

Appeal from the United States District Court for the District of South Carolina, at Charleston. Robert M. Hemphill, District Judge.

Submitted: July 17, 1978. Decided: August 16, 1978

Before RUSSELL, Circuit Judge; FIELD, Senior Circuit Judge, and WIDENER, Circuit Judge.

(W. Ford Duane, Robertson, Williams, Duane & Lewis, P.A., Thomas Dewey Wise, Stuckey & Wise, on brief for Appellant. Thomas E. Lydon, Jr., United States Attorney, Lionel S. Lofton, Assistant United States Attorney, on brief for the Appellee.)

PER CURIAM:

After a non-jury trial in the United States District Court for the District of South Carolina, Robert Peter Favreau

was convicted of three offenses [1] stemming from his part in the importation of a plane-load of marijuana from Colombia, South America to an airstrip outside Walterboro, South Carolina. Favreau contends that we should reverse because of the use as evidence of incriminating statements made before he had been apprised of his *Miranda* [2] rights and because the search of the airplane was done without probable cause and by customs agents beyond their territorial jurisdiction. We consider Favreau's appeal in light of a motion by the United States, filed pursuant to F.R.A.P. 27, to summarily affirm without oral argument the appealed-from convictions.

An examination of the record, the transcripts, and the briefs filed by the parties convinces us that to properly dispose of this appeal we need do no more than incorporate into our final judgment the pre-trial order issued by the district court on the questions presented on appeal. The district court correctly ruled that Favreau was not "in custody" when his incriminating statements were made, *Oregon v. Mathiason,* 429 U.S. 492, 495 (1977), and that the search of the plane and the subsequent use at trial of the contents found therein, considering the location of the plane, the suspected contents and the fact that, when searched, it had been abandoned, were reasonable. *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973); *Carroll v. United States,* 267 U.S. 132 (1925).

Accordingly, dispensing with oral argument, we hereby grant the appellee's motion to summarily affirm the judgment of the district court. *United States v. Dando, et al,* Cr. No. 77-79 (D.S.C., May 12, 1977).

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[1] Favreau was convicted of conspiracy to smuggle marijuana, 21 U.S.C. § 963; smuggling marijuana and aiding and abetting, 21 U.S.C. § 952(a) and 18 U.S.C. § 2; and possession of marijuana with intent to distribute, 21 U.S.C. § 841(a)(1).

[2] *Miranda* v. *Arizona,* 384 U.S. 436 (1966).

APPENDIX B

[Caption Deleted in Printing]

ORDER

Received October 8, 1978

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Russell for a panel consisting of Judge Russell, Judge Field, and Judge Widener.

Filed October 4, 1978

For the Court,
/s/ WILLIAM K. SLATE, II
Clerk

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Criminal Number 77-79

UNITED STATES OF AMERICA

v.

GEORGE WILLIAM DANDO, ROBERT PETER FAVREAU,
LONNIE JAMES BROWN and STEVE NEWTON DAVIS

ORDER

Original Filed May 12, 1977

Received May 13, 1977

On December 28, 1976, Victor D. Hockenberry, a Daytona Beach, Florida, city detective assigned to the Narcotics Task Force received information from the Drug Enforcement Administration, Miami, Florida, that a DC-4 aircraft located at Daytona Beach Regional Airport was going to make a trip to Columbia, South America. As a result of the information furnished by DEA, Miami, the aircraft was located, and on the morning of December 29, 1976, photographs were taken of both the aircraft and the people working in and around the aircraft. Through contact with Wilman's Aviation at the Daytona Beach Regional Airport, it was learned that an individual by the name of George Dando had paid certain bills for the aircraft, for fuel, etc. Through discussions with Mr. Wilman of Wilman's Aviation, it was also learned that another individual by the name of Robert Favreau had also been in the area and had contact with the DC-4 aircraft. Detective Hockenberry also made contact with Deputy Sheriff Zeke Walker because Walker was known to be a personal friend of Favreau's. Walker was questioned concerning Favreau's

ability to fly a plane such as the DC-4 and advised that Favreau was quite capable of flying this type of aircraft. Information was also developed that Dando had been a suspect in another drug case.

Approximately 7:00 P.M. on the evening of December 29, 1976, Hockenberry was advised that the DC-4 aircraft had departed Daytona Beach with Dando, Favreau and two other people on broad. Hockenberry was also advised that no flight plan had been filed by the DC-4 aircraft. On the morning of December 30, 1976, Hockenberry again contacted Deputy Sheriff Walker and advised him that the DC-4 aircraft had departed Daytona Beach, and its last known location was somewhere over the Andros Islands. Subsequently, Walker and two DEA agents from Miami flew different areas around the surrounding counties from Daytona Beach looking at different airstrips where the aircraft might land with the load of marihuana. This search revealed nothing. Subsequently, Deputy Walker was briefed as to the information that was available concerning Favreau.

On the morning of January 1, 1977, at approximately 4:00 A.M., Deputy Sheriff Walker contacted his friend Favreau (prior to this time Walker had attempted to contact Favreau without success) by phone and told him "Bob, I think we ought to talk." Walker then went to Favreau's house and Favreau got into Walker's car. Walker asked Favreau where he had been and Favreau told him Miami. Walker then told Favreau not to lie because he, Walker, knew he had been to Colombia, South America. Favreau then related to Walker that he and three other individuals, George Dando, Lonnie Brown and Billie Potts, had been to Colombia, South America, picked up "cargo," marihuana, and reentered the United States at Charleston, South Carolina, and had set the aircraft down at Walterboro, South Carolina. Favreau told Walker that the aircraft was offloaded at Walterboro, and the "cargo," marihuana, placed into two Ryder vans. Favreau advised that the original

plan was to airdrop the "cargo," marihuana, over North Carolina and fly the aircraft on to Michigan. At no time during this initial encounter did Officer Walker relate the "Miranda warnings" to Favreau. Subsequently, Walker took Favreau to see Favreau's partner where they sat around and drank coffee and "shot the bull." Walker called Detective Hockenberry and advised him that Favreau was with him. Subsequently, Favreau was taken by Walker to the Narcotics Strike Force Trailer where he was advised of his rights and interviewed by Detective Hockenberry. After being advised of his rights, Favreau refused to make any statements. During the course of his conversation with Deputy Walker, Favreau had advised that George Dando had a bomb, an incendiary bomb, and that he "would go to any lengths to do anything."

Hockenberry relayed all the information that he had developed from Walker to Luther Cooke, DEA, Charleston, South Carolina. As a result of the information from Daytona Beach, Cooke called the Walterboro Airport to determine whether or not the DC-4 aircraft was in fact there. Subsequently, Cooke contacted his agents and agents of the ATF because of the information that there might be a bomb on board the aircraft. The aircraft was subsequently boarded (photos introduced at hearing show ropes being tied to doors for fear that bomb might be rigged to doors) by ATF under the supervision of DEA generally and one DEA agent specifically who had Customs' search authority. No bomb was found but a large quantity of marihuana residue was aboard the aircraft. Subsequent investigation by DEA, Charleston, revealed that the two Ryder trucks used to off-load the aircraft had been rented from a service station in Charleston, South Carolina. The rental agreements reflected that one truck had been rented in the name of Robert Peter Favreau, and the other in the name of George William Dando. The rental agreements further reflected that the trucks had been rented at 10:00 P.M. on December 30, 1976. On the afternoon of January 1, 1977,

one of the trucks had been returned and marihuana residue was found in the cargo area. An APB (all points bulletin) had been placed for the other truck. On the morning of January 3, 1977, the second Ryder truck was located in the possession of Steve Newton Davis by the Charleston County Police Department, and marihuana residue was also found in the cargo area of this truck.

The defendants move to suppress all statements made by the defendant Favreau to Deputy Walker on the morning of January 1, 1977 on the grounds that Walker failed to advise defendant Favreau of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Court held that, absent knowledge and voluntary waiver of a defendant's Fifth Amendment rights, that the prosecution would be barred from using any statements stemming from questioning initiated by officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As a practical matter, the defendant must be advised of his "Miranda rights" and voluntarily waive them before any information gathered in a custodial interrogation may be used against the defendant. In the present case, the prosecution does not question the fact that defendant Favreau was not apprised of his constitutional rights until after he had related his role in the alleged criminal activity to Detective Walker. The question before this court is whether or not the facts of this case are such as to indicate that the encounter between Favreau and Walker constituted a "custodial interrogation" within the meaning of that term as used in *Miranda*.

In two recent cases the Supreme Court of the United States has outlined the meaning of the word "custodial interrogation" as used in *Miranda*. In *Oregon v. Mathiason*, 97 S.Ct. 711 (1977), the defendant voluntarily came to a police station and, while alone in a room with a police officer, confessed his commission of a burglary. The defendant in that case argued that the confession, which took place

prior to the defendant's arrest or any indication on the part of the police that the defendant would be arrested, should be excluded because the police station was a "coercive environment." The Supreme Court, addressing the question, stated that:

> In the present case, . . . , there is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a one-half hour interview respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody "or otherwise deprived of his freedom of action in any significant way."
>
> Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspected. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

It is clear that the Supreme Court would require some type of restriction on the suspect's freedom in order to render said suspect "in custody" for *Miranda* purposes.

In *Beckwith v. United States*, 96 S.Ct. 1612 (1976) the defendant urged that, although he was not actually "in custody", that the investigation had "focused" on him and that his protection, under *Miranda*, should apply to any statements made prior to being advised of his rights. The Court felt that "focused" as defined in *Miranda* meant nothing more or less than questioning initiated by law enforcement personnel subsequent to the suspect being taken into custody or otherwise deprived of his freedom of action in any significant way.

In the present case there are no objective indications that the defendant Favreau was in custody within the meaning of *Miranda*. He was not formally placed under arrest nor was he physically restrained or told by Deputy Walker that he could not leave. Absent objective indications of a deprivation of the defendant's freedom of action, the court should look to the subject of feelings of the defendant in the officer at the time of their encounter. At the time defendant Favreau made the allegedly incriminating statement to Deputy Walker, he was aware that he was not under arrest and felt, from his own testimony, that he was free to leave at any time. He testified, at page 124 of the transcript:

> Q. (Mr. Lofton)—"I understand what you are saying, but I want you to listen to my question and answer my question specifically. At the time Zeke Walker told you, 'Bob, you were not in Florida, you were in Columbia [sic], South America, then you were in Walterboro, South Carolina,' did you feel that you could not open that door, get out of that car and go back in your house?"
>
> A. (Mr. Favreau)—"At that time I had the feeling that, yes, I could have told Zeke to get lost and go on home."

At page 123, the defendant testified, in response to the questioning by the Assistant United States Attorney, that he felt as if he was free to leave the car at any time. Deputy Walker, on the other hand, did not feel that he was obliged to or justified in taking the defendant into custody until *after* the confession had been made. It is clear in this case that although Deputy Walker suspected the defendant, he would not have taken the defendant into custody absent the challenged confession. As the Court held in *Mathiason, supra,* the requirements of *Miranda* are not invoked merely because the questioned person is suspected of crime by the police. The holding in *Miranda* was an attempt by the Supreme Court to counteract the inherently coercive effects of custodial interrogation. In this case, neither the suspect or the officer felt that, at the time, there was any significant deprivation of the defendant's freedom of action. The officer, after the confession, felt that it was his duty to take the defendant into custody. Any other reaction on his part would defy logic. Therefore, this court finds that the interrogation of defendant Favreau by Officer Walker was not custodial within the meaning of that term as used in the *Miranda* decision. For this reason, it is admissible into evidence against the defendant.

The defendant also objects to the use, by the government, of the return of the search of the DC-4 aircraft at Walterboro Airport. At the time the search was carried out, the the plane was empty, out of fuel and secured to the airfield at Walterboro. As previously stated, the aircraft was boarded by an agent of the Drug Enforcement Agency who was specifically invested with customs' search authority with which to prevent merchandise from being introduced into the United States in a matter contrary to law. Customs Officers have been given express statutory authority to make searches without probable cause and without warrants. This authority lies pursuant to several sections of the United States Code and regulations which have been administratively developed pursuant to those sections. 19 U.S.C. § 482 provides that:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine, * * * any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, * * *.

19 U.S.C. § 1581(a) states:

> * * * may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters * * * and examine, inspect, and search the vessel or vehicle and every part thereof and any person, * * * or cargo on board * * *.

19 C.F.R. § 162.5 provides that:

> A Customs officer may stop any vehicle and board any aircraft *arriving* in the United States *from a foreign country* for the purpose of examining the manifest and other documents and papers and examining, inspecting, and searching the vehicle or aircraft. (19 U.S.C. 1581, 49 U.S..C. 1509) (emphasis added).

The defendant argues that this regulation cannot be construed to allow a warrantless search of an aircraft parked at a tie-down strip on an uncontrolled municipal airport.

In discussing the scope of the statutes authorizing border searches by customs officials, as limited by the Fourth Amendment, the Supreme Court in *Carroll* v. *United States,* 267 U.S. 132 (1925) said:

> Travelers may be stopped *in crossing an international boundary* because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways,

> have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. 267 U.S. at 154 (emphasis added).

The Court later recognized that permissible customs searches may not only be carried out at the border itself but at its "functional equivalence" as well. *Almeida-Sanchez v. United States*, 413 U.S 266 (1973). The Court gave two examples of what it considered the "functional equivalence" of a border search. They say:

> • • • For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalence of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search. 266 U.S. at 273

Since all the circuits have upheld searches as being at the "functional equivalent" of the border where, although the vessel or aircraft landed within the geographical boundaries of the United States, the customs officials had reason to believe that said vessels or aircrafts had come directly into the United States from a foreign country. *United States v. Barbera*, 514 F.2d 294 (2nd Cir. 1975); *United States v. Prince*, 491 F.2d 655 (5th Cir. 1974); *United States v. Chiarito*, 507 F.2d 1098 (5th Cir. 1975).

The search of the plane at Walterboro, South Carolina, must be considered a search at the "functional equivalent" of the border in light of the circumstances in this case. Defendant Favreau related to Deputy Walker the entire circumstances involving the alleged smuggling operation. The agent with customs authority who searched the aircraft had reliable information through Deputy Walker that the

airplane had flown directly to Colombia, South America, loaded an illegal cargo and had flown directly back into the United States and landed at the Walterboro Airport, and at Walterboro, the crew disembarked and the plane was left at substantially the same location where it first touched down in the United States. Any distinction between this situation and one in which a regularly scheduled airline lands within the geographic boundaries of the country would appear to be artificial. The customs officials cannot possibly search an aircraft until it lands. If an aircraft illegally flies to a foreign country and returns without filing a flight plan, and makes an unscheduled landing in a remote rural airport, it is unreasonable to acquire the customs officials to search the plane before they learn of its entry into the country. This case should be distinguished factually from a case involving an automobile which is continuously in the country from the time it enters. For these reasons, the search of the aircraft at the Walterboro Airport occurred at the "functional equivalent" of the border for purposes of the customs law. Therefore the search of the aircraft without a warrant was valid and the evidence should be admitted.

For the foregoing reasons, the defendant's motion to suppress defendant Favreau's statements to Deputy Walker and the results of the search of the DC-4 aircraft at Walterboro Airport are denied.

AND IT IS SO ORDERED.

United States District Judge
/s/ ROBERT W. HEMPHILL
Robert W. Hemphill

Columbia, South Carolina

May 12, 1977